

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re ACCREDO HEALTH, INC.
SECURITIES LITIGATION

This Document Relates To:

ALL ACTIONS.

) Civil Action No. 03-2216-BBD

) CLASS ACTION

)
) LEAD PLAINTIFFS' MOTION *IN*
) *LIMINE* NO. 1 PRECLUDING
) DEFENDANTS FROM OFFERING
) DEPOSITION TESTIMONY FROM
) WITNESSES WHO ARE (1)
) UNDER THEIR CONTROL; OR (2)
) NOT "UNAVAILABLE"

Lead Plaintiffs, Louisiana School Employees' Retirement System ("LSERS") and Debra Swiman ("Lead Plaintiffs") and the Class of investors who purchased Accredo stock between June 16, 2002 and April 7, 2003, respectfully ask the Court to prohibit defendants from offering deposition testimony of witnesses who are under their control or who defendants have not established are "unavailable" under Fed. R. Evid. 804(b)(1).

A party can rely on deposition testimony if the witness is *unavailable* for trial under Fed. R. Evid. 804(b)(1). But, a party cannot rely on deposition testimony without first establishing that the witness is "unavailable" within the meaning of the Rule. Here, defendants propose to offer deposition testimony of several witnesses for whom they have not established that they are "unavailable." Specifically, defendants have indicated an intent to offer deposition testimony from available witnesses Tom Corona, William Drummond, James Matthew Harding and R. Riley Sweat. Further, defendants have designated testimony for an available former employee (Pam Mason) and a current employee (Rita Holt). Each of these witnesses reside in the State of Tennessee and are available for trial pursuant to Fed. R. Civ. P. 45(b)(2)(C) ("a subpoena may be served ... at any place within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the ... trial...") and Tennessee Rules of Civil Procedure, Rule 45.05(1) (allowing for service of a trial subpoena "at any place within the state.")

Likewise, any witness under defendants' control, including current employees, are *not* unavailable to defendants within the meaning of Fed. R. Evid. 804(b)(1). *Chesler v. Trinity Indus., Inc.*, No. 99 C3234, 1999 WL 498592, at *3 (N.D. Ill. July 6, 1999) (observing that "Courts ordinarily assume that a defendant's employees will be available to testify regardless of venue, since they are under defendant's control"); *see also Grajales-Romero v. American*

Airlines, Inc., 194 F.3d 288 (1st Cir. 1999) (holding that a party's current employees are under its control for purposes of testimony). Here, defendants propose to offer deposition testimony of Rita Holt who is a current employee and, therefore, available to defendants.

Accordingly, Lead Plaintiffs request that the Court prohibit defendants from offering deposition testimony of the following witnesses who are not unavailable within the meaning of Fed. R. Evid. 804(b)(1): Tom Corona, William Drummond, James Matthew Harding and R. Riley Sweat, Pam Mason and Rita Holt.¹

Dated: September 8, 2008

Respectfully submitted,

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s/ Timothy A. DeLange

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¹ Should the Court deny this motion, Lead Plaintiffs reserve their right to submit a charge to the jury regarding missing witnesses.

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